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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 166

MAY RYAN, EXECUTRIX OF THE WILL AND ESTATE OF THOMAS RYAN, DECEASED, PETITIONER

v.

ACEL C. ALEXANDER, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF OKLAHOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the Western District of Oklahoma (R. 48–54) is not officially reported. The opinion of the Circuit Court of Appeals (R. 219–229) is reported in 118 F. (2d) 744.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 18, 1941 (R. 229). The peti-

tion for certiorari was filed June 14, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Is taxpayer estopped to claim a refund of taxes upon payments reported as income in his 1924 return but not received until 1925 where he did not report the true facts until after the expiration of the period of limitations with respect to the assessment of his 1925 taxes?

2. Is taxpayer entitled to depletion on bonuses received for leasing property (having no mineral value when acquired) upon which no well had yet been drilled nor oil found openly exposed?

3. Where the principal amount of taxes was paid voluntarily prior to assessment, is taxpayer entitled to a refund solely on the ground that assessment and collection of the deficiency were made during the pendency of his petition in the Board of Tax Appeals?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 13–19.

STATEMENT

The facts as found by the District Court (R. 48–53), may be summarized as follows (R. 48–53):

Thomas Ryan, the original plaintiff in this case, brought this action to recover income taxes

alleged to have been erroneously and illegally assessed and collected for the year 1924. During the pendency of the suit he died and his executrix was substituted as party plaintiff (R. 48).

Ryan's income tax returns for 1924 disclosed certain bonuses on oil and gas leases which he had treated as capital gains rather than ordinary income. Thereafter a decision of this Court established that such bonuses were subject to tax as ordinary income, and on the basis of that decision the Commissioner determined a deficiency against Ryan for 1924 (R. 49).

On December 26, 1928, after the Commissioner had determined the deficiency, a sixty-day letter was mailed as required by law. This letter was returned undelivered. A second sixty-day letter was mailed on January 15, 1929. On March 11, 1929, seventy-five days after the mailing of the first letter, the taxpayer filed with the Board of Tax Appeals his appeal from the Commissioner's determination of additional tax liability for 1924. An answer was filed by the Commissioner of Internal Revenue and the appeal was set for hearing at Oklahoma City on September 26, 1932 (R. 50–51).

After the filing of the petition but before the hearing, Tom F. Carey, taxpayer's income tax consultant, talked with a Mr. Rawdon, assistant to the Collector, concerning the payment of the deficiency, alleging that the taxpayer had stated

to him that he had the money at the time but did not know whether he would have it later, and that he would like to protect himself against subsequent assessments and the running of interest against the proposed deficiency. On October 2, 1929, the taxpayer, through his tax consultant, paid to the Collector of Internal Revenue $36,500, which was placed in the Collector's unidentified account. Accordingly, the Commissioner of Internal Revenue, having been informed of the payment, on November 23, 1929, assessed a deficiency of $36,500, the amount indicated in the deficiency letter, together with interest to and including October 2, 1929. The taxpayer was advised by the Commissioner of Internal Revenue that the assessment was being made in order to clear his records and that the taxpayer's rights would not be jeopardized before the Board of Tax Appeals. Demand was made for the interest of $9,135.73, which was paid under protest on December 10, 1929. The taxpayer took no action by a proceeding in court or otherwise to enjoin the collection of any part of the interest assessed (R. 51).

Upon the hearing before the Board of Tax Appeals in Oklahoma City on September 26, 1932, the appeal of the taxpayer was dismissed upon order of the Board (which was acquiesced in by counsel for the taxpayer) upon the ground that the Board was without jurisdiction since the appeal had not been filed within sixty days of the mailing of a

notice of deficiency to the taxpayer, as required by law (R. 51).

Subsequent to the dismissal of the taxpayer's petition to the Board of Tax Appeals, and on April 7, 1933, the taxpayer filed with the Collector of Internal Revenue a claim for refund. That claim, as amended on October 2, 1933, and on November 5, 1934 sought refund on various grounds, only three of which are still in controversy: (1) that the full amount of the deficiency determined by the Commissioner in his sixty-day deficiency letter of December 26, 1928, was refundable, since assessment and collection were forbidden while the appeal was pending before the Board of Tax Appeals; (2) that the taxpayer was entitled to a partial return of tax on account of the inclusion of $40,000 in his 1924 return, which was in fact received by him in the year 1925 and should have been reported as income for the later year; and (3) that taxpayer was entitled to discovery depletion on bonuses received in 1924 in connection with leases of certain oil lands. The Commissioner made certain adjustments not here involved and accordingly ordered a refund to a limited extent in a certificate of overassessment dated June 4, 1936, but otherwise rejected the claims (R. 51–52). Ryan then brought this suit against the Collector of Internal Revenue for the District of Oklahoma (R. 9–13).

The District Court found generally in favor of the Collector on all three grounds. Respecting

the first ground, it ruled as a matter of law that the full amount of the deficiency determined by the Commissioner in his sixty-day deficiency letter of December 26, 1928, was not refundable by reason of the pending Board proceedings at the time of assessment and collection (R. 53–54).

With respect to the second ground, the court found that items of $31,608.31 and $22,565.33 were included in Ryan's original return for 1924 and represented payments from oil runs which, to the extent of $40,000, the taxpayer alleged in his claim for refund were actually received by him in the year 1925 rather than in 1924. However, the taxpayer did not attempt to file an amended return for the year 1925 to include that portion reported in the 1924 return which he claims was actually received in the latter year, and the attention of the Commissioner of Internal Revenue was not called to this matter until the claim for refund was filed in April 1933,[1] after the statute of limitations had run against assessment of any deficiency for 1925 (R. 49–50).

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[1] Mr. Carey, the income-tax consultant, testified that in 1925 he discussed this matter with Deputy Collector Harry A. Sproles, but the conversation that he had with Sproles was of a rather casual nature. Sproles denied the conversation and said further that he had no recollection of any conversation with Carey concerning the return except the part which concerned an allowance for depletion. In making report on Form O, filed in May 1928, three years after this conversation had taken place with Sproles, this item was reported by Carey as income for the year 1924 and a deduction for depletion was claimed upon it (R. 50).

Respecting the third ground for refund, the court found long prior to 1924 the taxpayer had acquired certain land in Oklahoma for farming purposes, which had no mineral or oil value when acquired. In the months of August and September 1924, the taxpayer granted certain oil and gas leases upon that property. The first well was brought in during November of that year. The taxpayer reported this well as the discovery well in Form O, filed with the Commissioner of Internal Revenue in 1928. The discovery well on the taxpayer's land was not brought in prior to the execution of the leases, nor was the taxpayer's property proven when the leases in question were given and the bonuses therefor received. However, in this connection the taxpayer has sought to show that he contributed a valuable consideration to the cost of the drilling of a certain well on lands adjacent to his property. Thus the well was brought in on adjacent lands, not owned by the taxpayer, and the adjacent property was first proven for oil prior to any discovery well on the taxpayer's lands. The District Court therefore found that taxpayer was not entitled to discovery depletion on bonuses received for leases prior to the discovery well upon his property (R. 52–53).

The Circuit Court of Appeals affirmed the judgment of the District Court (R. 229).

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ARGUMENT

I

Petitioner does not deny that the oil payments were taxable in either 1924 or 1925. Ryan reported them in his 1924 returns, and only after the period of limitations for assessment of 1925 taxes had run, did he inform the Commissioner that the disputed payments were received in 1925 rather than in 1924. Both courts below, therefore correctly held that the taxpayer was estopped from seeking a refund for 1924 with respect to these payments.

The decision below is not in conflict with the cases cited by petitioner. Here, the taxpayer had made a misstatement of fact, and the District Court has found upon substantial evidence (R. 50) that he did not report the true facts to the Commissioner until after the statute of limitations had run. In the cases cited by petitioner, either (1) the party invoking estoppel had not shown that he was damaged (*Helvering* v. *Brooklyn City R. Co.*, 72 F. (2d) 274, 275–276 (C. C. A. 2d)); or (2) there was no representation of *fact* which was incorrect and upon which the Commissioner relied (*Crossett Lumber Co.* v. *United States*, 87 F. (2d) 930, 931 (C. C. A. 8th), and *Hull* v. *Commissioner*, 87 F. (2d) 260, 262 (C. C. A. 4th)); or (3) all the facts were available to the Commissioner before the statute of limitations

had run, and the Commissioner had merely overlooked their legal significance (*Louis Werner Saw Mill Co.* v. *Helvering,* 96 F. (2d) 539, 543 (App. D. C.); *Commissioner* v. *Union Pac. R. Co.,* 86 F. (2d) 637, 640 (C. C. A. 2d); *Hull* v. *Commissioner, supra*).

Nor is the decision below in conflict with either *Helvering* v. *Salvage,* 297 U. S. 106, or *McEachern* v. *Rose,* 302 U. S. 56. The opinion in the *Salvage* case indicates that since estoppel had not been pleaded, the question was not properly in issue and that in any event there was no "false representation of fact." 297 U. S. at 109. Similarly, the *McEachern* case did not involve any actual misstatement of fact. See also *Lofquist Realty Co.* v. *Commissioner,* 102 F. (2d) 945, 948 (C. C. A. 7th).

II

Taxpayer further claims that depletion should be allowed on bonuses which were received for leases prior to the completion of the discovery well upon the property. The basis for the claim is that an offset well upon adjacent property established the discovery value of Ryan's land. The only decision directly in point is in accord with the decision below. *Security First National Bank, Trustee* v. *Welch,* 92 F. (2d) 357 (C. C. A. 9th), certiorari denied, 303 U. S. 638.

There is no conflict, as suggested, with *Herring* v. *Commissioner,* 293 U. S. 322. That case in-

volved the 1926 Revenue Act, which by Section 204 (c) (2) substituted a flat depletion allowance of 27½ percent of the gross income from the property, wholly without reference to discovery value, recovery of investment, or value of oil. The statement in the opinion, that the existence of the well was not essential to a depletion allowance on a bonus (pp. 325–326), is thus clearly irrelevant to the present question, which concerns only the *basis* upon which an allowance should be made.

III

Taxpayer claims that the Commissioner's assessment and collection are void because they were made improperly while an appeal was pending before the Board of Tax Appeals. A conflict is asserted with numerous decisions, including *American Equitable Assur. Co.* v. *Helvering,* 68 F. (2d) 46 (C. C. A. 2d); *U S L Battery Corp.* v. *Commissioner,* 32 B. T. A. 810, affirmed 84 F. (2d) 1020 (C. C. A. 2d), on the authority of *American Equitable Assur. Co.* v. *Helvering, supra,* certiorari denied, 299 U. S. 593; *United States* v. *Yellow Cab Co.,* 90 F. (2d) 699 (C. C. A. 7th); *Ventura Consolidated Oil Fields* v. *Rogan,* 86 F. (2d) 149 (C. C. A. 9th), certiorari denied, 300 U. S. 672; *Bowers* v. *New York & Albany Co.,* 273 U. S. 346; *United States* v. *Continental Bank,* 305 U. S. 398.

None of these cases involves an express waiver of the taxpayer's right to postponement of tax assessment and collection. Here both the District Court (R. 54) and the Circuit Court of Appeals (R. 228) have found that payment of the $36,500 principal amount as a credit against the proposed additional assessment was a voluntary payment and constituted a waiver under Section 274 (d) of the Revenue Act of 1926, *infra*. Examination of the legislative history (H. Rep. No. 1, 69th Cong., 1st Sess., p. 10 (1939–1 Cum. Bull. (Part 2) 315, 322)) reveals that the purpose of the section was to allow taxpayers to pay the tax in order to stop the running of interest, without losing their right to proceed before the Board of Tax Appeals. And this is precisely what the taxpayer was seeking to accomplish in the case at bar.

Ventura Consolidated Oil Fields v. *Rogan, supra,* is the only case directly touching upon the question of waiver. But there it was held that a closing agreement which taxpayer offered did not constitute a waiver under the statute and that taxpayer did not intend it to be so treated. In these circumstances there is no conflict between the instant decision and the cases cited.

CONCLUSION

The decision of the court below is correct. There is no conflict of authority. No sufficient

reason has been shown for review and the petition should therefore be denied.

Respectfully submitted.

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JULY 1941.